No. 2791

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,
Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellees.

Brief of Appellant, American Water Works and Electric Company

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Upon Appeal From the United States District Court for the District of Idaho, Southern District.

WYMAN & WYMAN,
Residence: Boise, Idaho,
Solicitors for American Water Works and Electric Company.

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Brief of Appellant, American Water Works and Electric Company

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Upon Appeal From the United States District Court for the District of Idaho, Southern District.

STATEMENT OF THE CASE.

This is an appeal from certain orders made and entered by the District Court for the District of Idaho on February 14th, and March 1, 1916, denying appellant, the American

Water Works and Electric Company, leave to intervene and share equitably and ratably in a certain fund then and now in the exclusive possession of that Court known as the "Unsecured Creditors' Fund," and also from that certain order of March 1, 1916, directing the distribution of that fund to certain general creditors to the exclusion of the appellant and all other creditors.

On November 2, 1914, the Great Shoshone and Twin Falls Water Power Company was, and for some years prior thereto had been, engaged in the business of generating and supplying electrical energy for all purposes in Southern Idaho. It was at that time heavily indebted to both secured and unsecured creditors. The secured debt in the main consisted of an issue of bonds secured by a deed of trust and supplemental mortgages purporting to cover all properties of the company owned at the time of the execution of the deed and mortgages and all that it might thereafter acquire.

On that day, Guy I. Towle, a general creditor of the power company, filed in the District Court for the District of Idaho his bill of complaint on behalf of himself and all other creditors, setting forth, in addition to the necessary jurisdictional averments and the nature of his own claim that the defendant was heavily indebted to both secured and unsecured creditors; that these debts were due and the defendant was unable to pay them, and that unless a court of equity interposed and, through a receiver, took charge of and preserved the estate and marshaled the assets of the power company for the benefit and protection of those interested therein, there was great danger that the public interest would be prejudiced through the consequent suspension of defendant's business and interruption in elec-

trical service, and irreparable injury, damage and loss would result to its creditors; and complainant prayed the Court that his rights and those of all other creditors of the power company might be ascertained and decreed; that the Court administer and marshal all of the assets of the power company and ascertain and enforce their respective liens, equities, rights and priority thereto; and that all creditors and other persons be enjoined from instituting or prosecuting suits against the defendant and from levying any attachments, executions or other process upon or against any of its properties (tr. pp. 159 to 170). It will be observed the bill does not allege the insolvency of the defendant. On the contrary, it specifically states that its property, properly conserved and operated, is greatly in excess of its liabilities. Such was the current belief at the time; but the fact is that the power company was wholly insolvent and, despite the proper conservation and operation of its property so prayed for, its general creditors, except certain favored intervenors, will under the order of Court appealed from receive something like two per cent upon their claims. The intervenors and defendants referred to are to be paid in full.

On the same day as the filing of the bill, the power company answered admitting each allegation and joining in the prayer of said bill (tr. pp. 173-174); and thereupon the Court made and entered an order appointing a receiver of all the property real, personal and mixed, equities, rights and franchises of the power company and forbidding the attaching, levying upon, or seizing of the same (tr. pp. 171-173). The receiver immediately qualified and took possession of all of its property and assets.

On May 4, 1915, the Court directed the receiver to give

the notice usual in such cases requiring all creditors of the power company to file their claims with the receiver on or before August 10, 1915 (tr. pp. 343-344). Thereafter numerous creditors intervened or filed their claims in the receivership suit. The claim of appellee Carl J. Hahn was filed May 19, 1915 (tr. pp. 316-318); that of the appellant American Water Works and Electric Company on August 5, 1915, (tr. pp. 325 to 338). On August 10, 1915, the appellees L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said receiver and also filed with the Clerk of the Court a petition to intervene and as well as a pleading dominated a cross-bill of complaint. These papers, after setting forth the facts with respect to their claim state that such claimants are entitled to participate in the distribution of the assets of said power company and to receive their proportionate share thereof to which the then value of said claim might entitle them (tr. pp. 320-324). On August 14, 1915, the appellee Jake M. Shank filed his claim with said receiver (tr. pp. 338-339).

These claims were subsequently presented to the Court and allowed; that of appellees L. M. Plumer and E. B. Scull, executors, on October 16, 1915 (tr. p. 34); that of Guy I. Towle in October 23, 1915, (tr. p. 343); and that of Jake M. Shank on October 25, 1915 (tr. p. 341).

Prior to this time and on April 14, 1915, the appellee The Equitable Trust Company of New York, as sole trustee, under a deed of trust made by the power company dated May 1, 1910, and supplemental mortgages made by said power company dated June 21, 1911, and April 7, 1913, filed in this Court, wherein the administration suit was pending, its bill of complaint, and on September 16, 1915, a supplemental bill of complaint to foreclose the

deed of trust and supplemental mortgages above referred to (tr. pp. 7-64), and which had been given by the power company as security for a bond issue. The bonds were held by the Guaranty Trust Company of New York, and it has also filed with the receiver its claim therefor. The parties defendant to the bill were the power company, William T. Wallace, its receiver, Guy I. Towle, the complainant in the administration suit, and Carl J. Hahn, who as administrator of the estate of Harry M. King, deceased. had an unpaid judgment against the power company.

The receiver and the power company entered their appearances on May 3, 1915. On May 15, 1915, Hahn, Administrator, filed his answer, not denying any of the allegations of the bill of the Equitable Trust Company but setting out in detail the facts with respect to the claim upon which he had previously secured a judgment against the power company and in addition he averred that the trust company had permitted the power company and its receiver to remain in possession of the mortgaged property and of the income derived from the operation thereof and had out of such income paid current operating expenses as well as betterments and interest upon the bonds all of which had been entered to the benefit of the bondholders. That neither the original nor the supplemental mortgage covers the gross assets and income but that their lien extends only to the net assets and income after possession taken under the mortgage and then only subject to the payment of general running and operating expenses. The answer prays that the Hahn judgment be preferred over the mortgage and all other claims, and be paid out of income derived from the operation of the property or, if that be insufficient, then out of the corpus of the property

and that an accounting be had to determine the amount of current income and of all diversions (tr. pp 88-99).

It will be noticed that no attack is made by Hahn's answer either upon the validity of the mortgage or the extent of its lien, the matters presented and the superior equities claimed being such as are commonly urged in the administration suits under what is known as the "Six Months Rule," and perhaps cognizable only there.

On this state of the pleadings, the suit was set to be tried on Monday, October 25, 1915. On Saturday, October 23, 1915, Towle and Pulmer and Scull, as executors, and, on October 25, 1915, Shank, filed their answers, in which, after setting out their respective claims against the power company, they allege that the mortgage sought to be foreclosed, while good as to the realty, lacked the affidavit of good faith on the part of the mortgagor required by the statute of Idaho in the case of chattel mortgages and that it was not in fact filed as such in the office of the proper recording officer. Leave to intervene had been granted Plumer and Scull, executors, and to Shank on the dates of the filing of their respective answers. Towle was already a party defendant but had not answered until then, and at the time of answering was in default.

Motions to dismiss the petitions to intervene and to strike the answers were promptly made (tr. pp. 130-140) and overruled (tr. p. 141). The allegations of the answers were by agreement deemed denied (tr. p. 141).

The receiver had appeared but had not pleaded and by direction of Court he filed his answer on the morning of October 26, 1915, the day upon which the taking of evidence actually began. The averments of the bill were generally admitted; question was raised as to property covered by the mortgages—particularly with respect to

certain after-acquired property and personalty, description of which property is contained in the answer; and the receiver prays that, having found the amount due on the bonds, only so much of the property of the power company be sold as is covered by the liens of the mortgages; and that the receiver be given all proper relief.

After the close of the trial on October 27, 1915, the cause was taken under advisement. On November 17, 1915, Judge Dietrich filed his decision herein directing the foreclosure of the mortgage but sustaining the contention of the receiver and of Towle, Plummer and Scull, executors, and Shank as to certain of the personalty and directing that either party might introduce further evidence for the purpose of more completely identifying the property as to which the claims of these parties as well as that of Hahn, executor, were held to be superior not only to the lien of the mortgage but to claims of all other general creditors, but the fund was directed to be distributed to them alone. In other words, the proceeds of this property to be placed in a fund to be known as "Unsecured Creditors' Fund," and it was to be distributed to them to the exclusion of all other general creditors. A stipulation was entered into between counsel appearing upon the trial consenting to the sale of all the property as an entirety and decree was entered accordingly on December 6th, 1915, containing a provision for two funds called the "Bond Fund" and "Unsecured Creditors' Fund" and providing that the proceeds of the sale of the property as an entirety should be apportioned to the two funds according to the relative value of the property upon which the mortgage was decreed to be a first lien and that as to which Hahn, Towle and the interveners were decreed a superior lien.

Later, it was stipulated the value of the latter class of

property was $45,000.00 and that the sum should be paid out of the proceeds of sale of the entire property into the "Unsecured Creditors' Fund" (tr. pp. 210-212). The sale under the decree having been had and confirmed, the stipulation was complied with and the special beneficiaries of the fund promptly moved the Court for an order directing the special master to apportion the same among them (tr. pp. 224-40).

Going back now to the administration suit, we have seen that the receiver had given notice to creditors to prove their claims and that all the parties interested in this appeal had made such proof within the time allowed by the order. The claims had been reported to the Court by the receiver but no action had been taken upon them except that on October 16th, 1915, Plummer and Scull, executors, and a few days later, Hahn, administrator, Towle and Shank presented their claims to the Court ex parte and wholly without the knowledge of any other general creditor. This was immediately prior to the trial of the foreclosure suit. The claims were allowed and the intervention in the foreclosure suit immediately followed. The sale under the decree was advertised for January 8th, 1916.

Shortly after or about the time of the entry of the decree, the appellant here, American Water Works and Electric Company, learning for the first time of the allowance ex parte of the claims of Hahn, Towle and the intervenors, and also learning then for the first time of the proceedings taken by Hahn, Towle, and the intervenors as well as by the receiver in the foreclosure suit, applied to the Court for the allowance of its claims ex parte as had been done in the case of other claimants, but such allowance was refused and on December 24, 1916, the Court made an order in the administration suit, requiring all persons interested

and who desired to contest the validity or the amount due upon any claim filed with the receiver to file their objections thereto on or before January 17, 1916, and that a hearing thereon would be had on the 14th day of February, 1916 (tr. p. 346). No objection of any kind was filed to the claim of the American Water Works and Electric Company and its claim was accordingly approved, and on that day it presented to the Court its petition for leave to intervene and its complaint in intervention (tr. pp. 269 to 285).

The petition so presented sets forth that the appellant had filed its claim with the receiver as required by the order of the Court and the notice of the receiver; that it had an interest in the property and assets of the power company; that such assets were about to be distributed by the special master to a small number of general creditors to the exclusion of the appellant and the greater part of the general creditors and prayed leave to intervene and that the assets of the power company be not distributed or otherwise disposed of until after the hearing of the bill in intervention of the appellant, but that such assets be then paid to the receiver for distribution to the general creditors of the power company (tr. pp. 270-272).

The bill of comlaint tendered by the appellant in connection with its petition set forth the proceedings in the receivership suit; that prior to the time set for the hearing and allowance of claims, the Court at chambers ex parte and without the knowledge of this appellant allowed the claims of said appellees, Guy I. Towle, Carl H. Hahn, administrator, Jake M. Shank and L. M. Plummer and E. B. Scull, executors; that the said appellees without either notice or knowledge thereof by the appellant intervened and filed their answers in the foreclosure suit for the purpose of acquiring a preference and set up a lien and in-

terest superior to that of the receiver and prayed that the Court adjudge and decree that the assets of the power company not decreed to be subject to the lien of the trustee be turned over to the receiver of the power company to be held and distributed by said receiver equitably and ratably, in the receivership suit (tr. pp. 273-284). The Court, on the same day, disallowed said petition and complaint, but granted the appellant additional time in which to make a further showing (tr. p. 285).

On February 22, 1916, without any notice whatever to the appellant herein, Towle and the other special claimants filed in the foreclosure suit their petition for an order directing the special master to distribute to them the "Unsecured Creditors' Fund," thus paying their claims in full. Incidentally learning of this application, the appellant here on the same day set for the hearing of the petition to distribute that fund, presented to the Court its complaint in intervention which had been amended in certain respects to meet the requirements of the Court.

This application of appellant came on to be heard on the 29th day of February, 1916. No pleading or motion was filed by any party to the suit attacking the application and no objections or any showing was made or any evidence introduced. The Court, however, on the same day, from the bench denied the petition of appellant (tr. p. 302), and although upon the hearing of said petition and amended complaint no evidence was introduced by any party and no objection filed thereto, the Court nevertheless in reaching its conclusion considered in addition to the petition and amended complaint of the appellant all of proceedings, and other matters shown by a great mass of papers and records in the suit, all of which are referred

to and set out in the statement of the Court (tr. pp. 310-315).

The original of this amended complaint had been sent to New York, the place of residence of the President of the Company, for verification in accordance with the facts as they appeared, but consent was given to the use of the unverified complaint with the understanding that the amended complaint in intervention verified by the proper officer should be lodged as of February 28, 1916 (tr. pp. 286-301).

Paragraph XVIII of the amended complaint was found by the verifying officer not to be exactly true in point of fact and it was accordingly changed so as to conform to the truth. As verified, the paragraph sets forth that the appellant had made no assignment of the claim but had retained it and still retained the title to the claim and that the National Securities Corporation had no authority or control through stock ownership or otherwise over the intervenor (tr. p. 314 and see p. 299 for this paragraph as it appeared before change by the verifying officer).

Thereafter, on March 1, 1916, the Court made and entered its order denying appellant the right to intervene in the foreclosure suit (tr. p. 309); and on the same day directed the special master in the foreclosure suit to pay in full the claims of the appellees Guy I. Towle, Carl J. Hahn, administrator, Jake M. Shank, L. M. Plumer and E. B. Scull, executors (tr. pp. 240-242). Thus the Court below in effect held that certain assets of the power company then in its exclusive custody and control were not subject to the lien of the trustee under the trust deed and mortgages but it refused and denied the appellant not only any share in the distribution of those particular assets but also the right to have its claim to them heard and

the facts with respect to that claim determined in the only court having any jurisdiction over the subject matter.

The appellant and all other general creditors were represented in the foreclosure suit by the receiver. The Court having held that the particular property and assets of the power company involved in this appeal were subject to a superior lien existing in favor of all general creditors and acquired by them by virtue of the appointment of the receiver and the filing of their claims and allowance thereof in the administration suit, denied appellants any right thereto in common with all other general creditors, but ordered that these assets be distributed to certain of the general creditors to the exclusion of all the others. Such is the effect of the decision. The particular right denied was that of intervention prayed for so that appellant might establish its interest in and claim to a fund then in the exclusive custody of the Court and which the Court was about to distribute in such manner that appellant would be wholly remediless and would suffer the loss of its entire interest in that fund. From this action by the Court below appellant appeals.

SPECIFICATION OF ERRORS.

The errors relied upon stated fully in the record (Trans. 348-351) are in general as follows:

1. The Court erred in holding that the petition and complaint in intervention of the appellant American Water Works and Electric Company, were insufficient and in denying the same and requiring said appellant to make a further showing.

2. That the Court erred in holding the petition and amended complaint in intervention of the appellant insufficient and in denying appellant leave to intervene and

the right to have determined its claim and interest in a certain fund in the exclusive jurisdiction, dominion and control of the Court.

3. That the Court erred in ordering the distribution of said "Unsecured Creditors' Fund" to a certain few general creditors to the exclusion of the appellant and all other creditors without giving appellant an opportunity to establish its interest in said fund; and in denying the appellant the right to have such fund equitably and ratably distributed among all general creditors having an interest therein.

POINTS AND AUTHORITIES.

I.

When a corporation becomes insolvent, and the corporate assets have passed into the hands of a receiver, such assets constitute a fund for ratable distribution among its creditors; and no creditor can by any subsequent proceedings acquire a greater interest in or preference to the trust fund so sequestered.

Clark v. Bacorn, 116 Fed. 617, 54 C. C. A. 73;

Thompson v. Huron Lbr. Co., 4 Wash. 600, 30 Pac. 741;

Thomas vs. Cincinnati N. O. & T. P. Ry. Co., 91 Fed. 202;

H. K. Porter Co. v. Boyd, 171 Fed. 305, 98 C. C. A. 160;

Bailey v. Mosher, 63 Fed. 488, 11 C. C. A. 304;

P. S. Co. v. New York C. Ry. Co., 198 Fed. 721, at page 738, 117 C. C. A. 491;

Shaffer v. McCulloch, 192 Fed. 801;

Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155.

II.

Where one claims an interest in a fund or specific property in the exclusive jurisdiction and subject to the exclusive dominion, custody and disposition of a Court and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that Court, he has an absolute right to intervene and to review by appeal an order refusing such right.

Simpkins Fed. Eq. Suit, p. 485.

Foster, Federal Practice, secs. 258, 259.

W. U. Tel. Co. v. U. S. & Mexican Trust Co., 221 Fed. 545.

Credits Com. Co. v. U. S., 91 Fed. 570, 34 C. C. A. 12.

Credits Com. Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. ed. 782.

U. S. Trust Co. v. Chicago Terminal R. R. Co., 188 Fed. 292, 110 C. C. A. 270.

Minot v. Masten, 95 Fed. 734, 37 C. C. A. 234.

Tift v. Southern R. R. Co., 159 Fed. 555.

Illinois Steel Co. v. Ramsey, 176 Fed. 853, 100 C. C. A. 323.

Central Trust Co. v. Chicago R. I. & P. R. Co., 218 Fed. 336, 134 C. C. A. 144.

U. S. v. N. W. Development Co., 203 Fed. 960.

Savings and Trust Co. v. Bear Valley Irri. Co., 93 Fed. 339.

In re Columbia R. E. Co., 112 Fed. 643, 50 C. C. A. 406.

Thomasson v. Guaranty Trust Co., 159 Fed. 126, 86 C. C. A. 514.

ARGUMENT.

I.

While the complaint in the suit brought by Towle against the Great Shoshone and Twin Falls Water Power Company specifically states that that company was not insolvent, but that on the other hand its assets greatly exceeded its liabilities, the true situation was disclosed shortly after the filing of the bill. It then became apparent that the power company was wholly insolvent and that its general creditors holding claims aggregating several million of dollars would receive but a small fraction of the amount due them. The Towle suit is admittedly one for the general administration of the assets of the power company and through it that company's property will be sold, its creditors paid in part and its affairs wound up. It is in nowise different from the ordinary general creditors suit of which we have frequent examples.

In the present case, upon the filing of the bill a receiver was appointed, who, under the order of the Court, took immediate possession of all of the assets of the defendant. Leaving out of consideration the rights of the secured creditors, those general creditors who thereafter joined in the proceedings, and proved their claims acquired certain definite rights with respect to the assets of the defendant, the most important of which are that no one should thereafter be permitted to obtain by judicial proceedings or otherwise any claim or interest therein superior to theirs and that when such assets were converted into cash, that cash after the payment of the expenses of administration and secured debts properly payable out of the fund, should be distributed ratably to them.

It is not necessary for this appellant to discuss in this

brief the exact nature of the interest in the property of the power company so aquired in the receivership suit, in that this proposition will be ably and thoroughly discussed by the appellees Hahn, Towle, Shank, and Plumer and Scull (hereinafter sometimes called special claimants). Insofar as these appellees contend that they, as creditors, have an interest in the general assets of the insolvent corporation and that the lien of the trustee does not cover certain personal property of the power company, this appellant is in accord and makes the same contentions.

This appellant, however, makes the further and special contention that whether these appellees or whether the receiver sets up these rights and makes these contentions, inasmuch as the rights of these appellees are based expressly upon those acquired in common with all other general creditors by virtue of the general creditors' suit, such general assets belong to the receiver to be equitably and ratably distributed among all the general creditors in the general creditors' suit.

As one of these general creditors this appellant has the same interest and exactly the same right with respect to the property involved herein and its status is in nowise different from that of these appellees. We are not now speaking of proceedings subsequently taken and by which it is contended that in some manner certain general creditors became possessed of additional rights or equities over and above those had by other general creditors, but we are dealing only with that right upon which ultimately must rest any and every claim any general creditor can properly make to the assets of the insolvent corporation whose property is being administered in a general creditors' suit. The rule of law underlying this common status of both

this appellant and the special claimants here is so well established that reference need be made to no more than a few of the cases in which this rule has been considered.

Clark v. Bacorn, 116 Fed. 617.

Shaffer v. McCulloch, 192 Fed. 801; 113 C. C. A. 535.

Tompson v. Huron Lumber Co. 4 Wash. 600; 30 Pac. 741.

Haehnlen v. Druyton, 192 Fed. 300; 112 C. C. A. 558.

Chemical Nat. Bank v. Armstrong, 59 Fed. 372; 8 C. C. A. 155.

Bailey v. Mosher, 63 Fed. 488.

H. K. Porter v. Boyd, 171 Fed. 305; 98 C. C. A. 160.

Penn. S. Co. v. N. Y. C. Ry. Co. 198 Fed. 721, at 738; 117 C. C. A. 491.

So, then, appellant and these special claimants had at least up to the time of the latter's intervention in the foreclosure suit, interests in the assets of the power company of exactly the same nature and dependent upon precisely the same judicial proceedings.

II.

The property with respect to which all general creditors of the power company thus had an interest was in the possession of the receiver appointed by that Court in which the mortgage thereon was being foreclosed, and both Wallace, the receiver, and Towle, the complainant in the general creditors' suit, were parties defendant in the foreclosure suit. In its bill of foreclosure the trustee contended that the lien of its mortgages covered all of the defendant's property of every kind, and it sought to have

that property sold by a special master appointed for that purpose in the foreclosure suit and to have the proceeds paid not to the receiver but to the special master, so that he might pay them to the trustee for the use of the bondholders. The effect of such action would have been to have taken from the possession of the receiver all the properties and assets of the defendant, then to have converted the same into cash, to have placed that cash in the custody of another agency of the Court and to have divested the general creditors of their interest in the same. The receiver by his answer in the foreclosure suit alleged that the lien of the trustee's mortgage did not cover certain personalty, pointing out quite specifically the property not so covered, and as to it he sought to have the decree so limited that this property should not be sold under foreclosure but should remain in his possession for administration in the general creditor's suit. Such at least was the necessary effect and his contention was sustained.

Moreover, certain parties to the foreclosure suit Towle (but not Hahn) and certain intervenors, Shank and Plummer and Scull, executors, all of whom had joined in the proceedings in the general creditors' suit, were seeking to secure exactly the same relief as prayed for by the receiver, except that they sought to have the Court direct the receiver to pay them first out of the proceeds of the property not covered by the mortgage, thus making them preferred creditors to that extent.

Thus we have a special property or a special fund, the proceeds of that property, in the possession of a Court of competent, exclusive and general jurisdiction charged with and engaged in its administration and distribution. And we likewise have a claimant, the appellant here, having or

at least claiming to have a definite interest in that property or fund.

Admittedly, if appellant had any such interest in the fund, it must either forego that claim or present it to the Court having possession of the property and exclusive jurisdiction with respect thereto and was then about to convert the property into cash and to distribute it in such manner as would leave appellant with no hope or possibility of recovering any part of it after such distribution, no matter how well founded might be its claim to the same.

Under these circumstances, appellant came into that Court with its petition for leave to intervene and tendered its bill of complaint in intervention setting forth as we have seen all the facts in relation to the matter and praying that after it had established those facts by proper proof, the fund might be paid to the receiver for distribution under direction of the Court in the administration suit and for general relief.

Leave to intervene is not ordinarily an absolute right but lies in the sound discretion of the Court to be granted or refused according to the exigency of the particular case, and while that discretion is usually exercised in favor of the petitioner so that a multiplicity of suits may be avoided and justice speedily done, yet it may properly in many cases be denied. There is, however, a class of cases in which intervention does not rest upon discretion but is an absolute right, since it rests upon grounds of necessity and the inability of the intervener to obtain the relief he is entitled to by any other means.

Simkins, Fed. Eq. Suit, p. 485.

Foster, Fed. Prac. Secs. 258-259.

Western Union Tel. Co. v. U. S. & Mex. Trust Co. 221 Fed. 545.

Credits Commutation Co. v. U. S. 177 U. S. 311; 44 L. Ed. 782.

Credits Commutation Co. v. U. S. 91 Fed. 570; 34 C. C. A. 12.

Tift v. Southern Ry. Co. 159 Fed. 558.

Illinois Steel Co. v. Ramsey, 176 Fed. 853; 100 C. C. A. 323.

Minot v. Mostin, 95 Fed. 734; 37 C. C. A. 234.

U. S. v. Philips, 107 U. S. 824; 46 C. C. A. 660.

U. S. Trust Co. v. Chicago Term. Co. 188 Fed. 292; 110 C. C. A. 270.

U. S. v. Northwestern Development Co. 203 Fed. 960.

In re Columbia R. E. Co. 112 Fed. 643; 50 C. C. A. 406.

Thomasson v. Guaranty Trust Co. 159 Fed. 126; 86 C. C. A. 514.

The application of this rule to the facts here would seem to be clear. The Court, by entertaning the creditors' suit, by the appointment therein of the receiver, who under the direction of the Court took possession of the property in question, and by its restraining and enjoining all persons from attaching, levying upon or seizing any of that property, took to itself the entire and exclusive jurisdiction of the subject matter. No other Court might thereafter properly undertake to direct the disposition of the property or the distribution of its proceeds. Appellant had or claimed to have an interest in that property then in the custody of the Court. Appellent could go nowhere else for relief and the Court had unquestioned authority to grant all the relief it sought; and the circumstances of the case were such that if appellant permitted the fund to be

distributed to Hahn and the other claimants acting with him, its claim to the fund would be entirely lost and it would be wholly remediless.

Thus we have here a fund in the custody of a Court that is about to distribute it in such manner that will place it beyond the possibility of recovery by anyone and we also have a creditor who had an interest in that fund and who seeks to intervene that it may have determined the nature and extent of that interest.

We contend that the facts and circumstances of this case clearly bring appellant within the rule that allows such intervention as a matter of right.

Such was not the view of the District Court. It regarded the granting or denying of the application to intervene as wholly a matter within its discretion. This is made clear from the memorandum decision wherein it speaks of appellant as asking "the Court to exercise a liberal discretion in its favor." As we shall see hereafter, appellant was not denied leave to intervene by reason of any matter appearing upon its petition and complaint or amended complaint, but upon matters wholly extrinsic, believed by the Court to be true and to warrant the action taken but the truth of which appellant had no opportunity to deny or to show matters in avoidance.

III.

In addition to or as supplementing the proposition that leave to interevene under the circumstances of the case lay wholly within the discretion of the chancellor, the decision of the Court below seems to rest upon two propositions; first, that the special claimants had by their efforts caused the "Unsecured Creditors' Fund" to come into existence and then that appellant had been guilty of laches.

So far as the matter of discretion is concerned we have sought to show that the facts here bring appellant's application within that class of cases wherein intervention is a matter of absolute right; and that under those facts and that rule appellant did not "ask the Court to exercise a liberal discretion in its favor," but sought that which might not properly be refused.

Did Special Claimants Cause Fund to Come Into Existence?

But by what efforts did these special claimants create the "unsecured Creditors' Fund" or to what extent may it properly be said to be the fruits of their efforts?

The facts in regard to this entire matter appear in appellant's complaint in intervention. It was under oath and no denial was made of any of its statements and they must therefore be deemed admitted.

It thus appears that, having joined in the general creditors' suit and having thus accepted the benefits of that action and assented to ratable distribution of the assets in the receiver's hands, these special claimants secured certain information vitally affecting the common interests of all general creditors. This information they chose not to communicate, either to the other general creditors or to the receiver appointed for their equal protection. On the contrary, they deliberately sought to use it so as to obtain some special advantage over their associate claimants in the administration suit. Accordingly, having obtained the ex parte allowance of their claims in that suit without knowledge of this appellant or the other creditors, the defendant Towle (but not *Hahn)* and the interveners again without the knowledge of this appellant or of the creditors equally interested filed their answers in the foreclosure

suit claiming special liens and equities as to certain prop erty not only over the lien of the trustee's mortgage but to the exclusion of all other general creditors from any share therein.

Those, however, were not the only proceedings in the foreclosure suit taken with the purpose of defeating the trustee's lien upon the property in question here. The receiver, himself, representing all the general creditors, filed an answer, in which he described the property in question with a particularity lacking in the answers of Towle and his associates and he pleaded that questions of law which arise with regard to various of the parcels of property as to whether they are included within the terms of the said trust deed or mortgages set forth in the bill of complaint; he showed the facts that defeat the trustee's lien, and prayed that only so much of the property of the defendant be sold as is covered by the trustee's mortgages and for general relief. It is true that his answer does not specially point out the lack of the required affidavit or that the mortgages had not been filed as a chattel mortgage, but upon the issues as made by the receiver's answer all the relief claimed by Towle and the interveners would properly have been granted. Under it, the Receiver not only could properly urge that the mortgage was void or ineffective as against claims of creditors because of the matters above referred to *but he did actually join at the trial in urging this defense.* The decision of the District Judge specifically so states (tr. pp. 181-2). So Towle and the interveners did not urge any defense that would not otherwise have been presented, nor did they take any independent action upon the trial. They and the Receiver acted together and he as much as they made the defense against the mortgage.

But the defendant Hahn stands in quite a different position. Instead of answering after he had become in default as Towle had done, he answered promptly, but nowhere did he either directly or indirectly raise the issues upon which the defense was based. On the contrary, he admits, by not denying, the claim of the trustee to the entire property. His whole answer, so far as it sets out any defensive matter, is concerned with a claim for preference under the Six Months Rule growing out of diversions of income and the like. No relief whatever could have been granted to him under issues of *his* answer; but nevertheless he was awarded an interest in the property not only over the lien of the trustee's mortgage, but also an interest in that property to the exclusion of this appellant. On whose answer was this relief granted to Hahn? What did Hahn contribute to the defense? So far as he was concerned, the only way in which any relief could have been granted was through issues made and the contentions urged by the receiver. Thus, the appellant, who was represented by the receiver, is denied all participation in the fund despite the receiver's answer, while Hahn is awarded a decree upon an answer that dos not raise the defense but admits the validity of the mortgage. So we insist the decree is not the result of the diligence of any of these special beneficiaries.

Laches.

But the decision of the Court below was largely affected by the consideration, that appellant had been guilty of laches. The grounds on which this charge is alleged to rest are that appellant did not seek to intervene until the hour set for the confirmation of the sale (February 14, 1916); that knowing of the pendency

of the foreclosure suit and presumably being advised of its rights, it chose to remain silent and inactive and that its claim in the administration suit, while duly filed, had not been allowed. Other contentions may be urged in this Court but they will not be the ones consideration of which Court but they will not be the ones in consideration of which the Court denied the petition to intervene.

In discussing this phase of the case, the District Judge has stated in his memorandum decision that appellant must have known of the pendency of the foreclosure suit and was presumably advised as to its rights. If by that it is meant that appellant knew of the defects in the mortgages, there is not only nothing in the record upon which to base any such statement and it is not true. The fact seems to be that no one knew of these defects until immediately before the trial, and there is nothing in the record upon which to base the assertion that appellant knew of the matter until long after the trial. The special claimants themselves did not acquire the information until after the case had been set, or so we may conclude from the fact that their answers were not filed until a day or two before the trial. This is true of all the special claimants except Hahn, whose answer was filed some months previously, but as we have seen it does not raise this issue.

But on the Court's own theory, appellant could not be let into the defense until after its claim had been allowed, such allowance was had February 14, 1916, and on that very day appellant presented to the Court its petition for and complaint in intervention.

But the special claimants will undoubtedly urge that this was too late. But why too late? The fund was still in the possession of the Court wholly undistributed and the delay, if there was any delay, in securing the allowance

of the claim had resulted in not the slightest injury of any kind to the special claimants. The fact the claim was not allowed until February 14 would therefore seem to be no reason for denying appellants its share in that fund.

It is not fair, however, to say that appellant did not move in this matter until the day of the confirmation of the sale. That was the day on which it presented its first petition to intervene; but long prior thereto, and very shortly after the decree, it had applied to the Court below for an ex parte allowance of its claim and this application was denied on the very good ground that there should be a general order with respect to all claims. And it was not counsel for the receiver but counsel for the appellant here who, on December 24, 1915, after the application for allowance of its claims ex parte had been denied, drafted and caused to be signed and filed the general order with respect to the proof of claims. The date for the hearing of objections to claims was fixed as of February 14, 1916, because of the intended (and actual) absence of the District Judge from the jurisdiction from the latter part of December, 1915, until about that time. It was not in anywise the fault of the appellant here that its application was not presented sooner or that its claim was not allowed at an earlier date.

But it will be urged by appellees that some of the statements in the last paragraph and which are urged as avoiding the charge of laches do not appear in the record and therefore cannot be considered here. The difficulty with that contention rests on the ground that there has been an entire inversion of the usual rules with respect to the matter of laches. Relief was denied appellant because of laches in that it had remained silent and inactive, although knowing of the fact of the pendency of the cause and pre-

sumably knowing of the defense that might be made, and further that it had not had its claim allowed seasonably. But the complaint in intervention specifically alleges that the appellant did not know of the allowance of claims of Hahn and his associates and did not know that that case had come to trial. These are matters of fact. The defense to the complaint in intervention is laches and appellees deny certain statements contained in the complaint and urge other matters not appearing on the face of that pleading or elsewhere on the record upon which the application was made and heard. These are issues of fact upon which appellant was entitled to its day in court. If the charges are true, they should have their proper effect, but appellant ought not to be denied the right to meet them. Every inference that can be drawn from papers not a part of the record upon which the application for intervention was presented or heard, every suggestion of a possible adverse fact or circumstance, every vague impression gained from statements or proceedings to which appellant was not a party ought not to be permitted either to outweigh positive allegations to the contrary or to be accepted as reasons for denying appellant's application. It would have taken but a few weeks at the outside to have framed the issues and tried the right to intervene upon the merits.

It is impossible to read the opinion of the District Court without seeing that his decision was largely influenced by the thought that if he knew all the facts there would appear somewhere among them sufficient reason for denying the application on the ground of laches.

The District Judge believed that the granting of the petition was a matter within his discretion and he considered that appellant was calling upon him not to exercise

the usual but a liberal discretion in its favor. Under these circumstances it was perfectly natural, perhaps, that he should decide the application not wholly upon the record presented to him at the time, but that he should consider it from a much larger view point. Thus we find the grounds upon which the opinion and decision in this case rest consists of a series of presumptions not supported by the record before the Court. It was assumed that appellant was informed at all times as to proceedings in the foreclosure suit; that it knew of the defects in the mortgage and that certain creditors were attempting to defeat it as to certain property because of that defect; that appellant deliberately refrained from joining in the efforts being made by those creditors but on the contrary sought to aid the trustee in respect to that matter; and that as soon as the decree had been entered awarding to the special claimants the fund in controversy, it promptly appeared for the purpose of despoiling them of the fruits of a hard won victory. None of these matters appeared upon the face of the record presented to the District Judge upon appellant's application. If these are the facts of the case it may very well be that appellant should be denied all relief, but it denies that these are facts. It was impossible for it to have anticipated that any such matters would be considered by the Court. It was thus denied its opportunity to meet them, to show what the truth is in respect thereto. Answers should have been filed urging these and any other defensive matters that were thought to exist, and upon these issues a hearing should be had.

Where the allowance of the application is entirely within the discretion of the chancellor, it doubtless many times happens that that discretion is exercised as it was in this case, but where it presents a matter of right we insist

that it should be granted or denied upon the record without indulging in presumptions or the consideration of impressions not in anywise supported thereby.

In considering the matter of the distribution of the "Unsecured Creditors' Fund" it must not be overlooked that the proceedings by which the property was taken from the receiver and given over to the special master for distribution to the special creditors, were taken prior to the general allowance of claims and thus falls, as we understand it, within the inhibition of the rule laid down by this Court in the case of American Surety Company vs. Mills et al., decided on or about May 1st, 1916, and still unreported.

Would the Allowance of the Application Result in Any Injustice to the Special Claimant?

It was also urged that if appellant's intervention was allowed some injury might result to the special claimants because proceedings taken with respect to fixing the value of the property held not to be covered by the mortgage and laches are charged to appellant in this matter.

Thus reference is made in the opinion to a stipulation fixing the value of the personalty not covered by the prior lien of the mortgage at a sum sufficient only to cover the debts due the preferred claimants and it is suggested that if these claimants had known that appellant was about to press its claim to that property, possibly a greater value than $45,000.00 would either have been stipulated or fixed after hearing. The stipulation with respect to this matter was signed by counsel December 24, 1915, and the order was made December 27, and both stipulation and order were filed on December 29. Every counsel connected with the case knew perfectly well sometime prior thereto that the appellant was preparing to do exactly

what later it did. After its application for the ex parte allowances of its claim had been denied, appellant's solicitors prepared and presented the order of December 24th, fixing the date upon which all claims would be allowed or rejected. A copy of that order was immediately sent to the solicitor of every general creditor.

However, if it be true that the property in question is of greater value than $45,000.00, no one is more interested in that fact than appellant, and its solicitors will very gladly join those of the special claimants in asking that it and they be relieved therefrom and that the true value be fixed. We entertain as little doubt as do they that, from what the District Judge said from the bench in regard to this matter, immediate relief will be granted; but we again urge that in this respect, as in respect to all other grounds upon which appellant's application was denied, presumptions were indulged in against appellant that have no foundation so far as the record presented to the District Judge is concerned and that if it claimed to have any foundation in fact, then the appellant ought to have the opportunity of meeting them.

So no injury will result to the special claimants by reason of appellant's intervention. They will secure exactly the distributive share to which they are entitled.

Besides this appellant has expressly offered in his complaint to pay its proportionate part of all costs, expenses, outlays and attorneys' fees incurred by them (p. 299).

While the allowance of appellant's intervention and the consequent participation by all general creditors in the fund will result in no injury to the special claimants for the reason they will still receive their just and equitable share thereof, the denial of that intervention will result in depriving the other general creditors of their proper dis-

tributive share in the assets of the power company. In what manner did these other creditors lose their interests in that property, and by what right did these special claimants acquire it?

Special Claimants' Position Without Equities.

We have seen that, having secured information of vital importance to every general creditor in the administration suit, these special claimants did not disclose it to their associates. Had they desired to be fair, would they not have given notice as to the situation to those with whom they had joined in proceedings looking to the equitable and ratable distribution of the property of their common debtor? Why did they not ask the receiver to appear for all?

The only right to intervene in the foreclosure suit set up or claimed by them existed not by virtue of any special facts or special equities in their favor but was avowedly based and wholly rested upon the lien or status with respect to the property that had been secured to them in common with all other claimants by reason of the proceedings in the general creditors' suit. To permit those proceedings thus to be perverted and to be used as a means of defeating a ratable distribution of common trust funds, we contend is contrary to the equitable theory upon which creditors' suits rest, if it be not in violation of the injunction issued therein.

It may be that no contractual relation exists among those who join in a general creditors' suit, but an equitable relationship exists that carries with it the requirement of good faith upon the part of all. The suit was brought for the common benefit and for the express purpose of prevent ing any one creditor from getting an advantage over the

others or a larger relative share in the common trust fund. The special claimants assented to and became parties to those proceedings. The trust fund was placed in the hands of an officer of the court so that there might be, as there was in this case, an efficient and honest administration thereof and a ratable distribution of the proceeds. Can it be doubted that in honor and in good faith one creditor is precluded from using that status or lien upon the fund secured to him by his joining in such a suit as a means of appropriating to himself the entire trust fund?

The interest these special claimants had in the property in the hands of the receiver was such part thereof as was expressed by the ratio that the aggregate of their claims bore to the sum total of the claims of the general creditors. This of course does not take into consideration the sums due secured creditors or the expenses of administration. That was the extent of their lien or interest in the fund; and when they intervened in the foreclosure suit they could not properly claim a larger share in the fund than the proportionate interest as above indicated, if indeed they could under the circumstances act for themselves alone and not for all.

But these special claimants not only assented to becoming parties to the general creditors' suit but they also assented to and were bound by the injunction issued in that case which specifically forbade any person from seizing or levying upon the property of the power company. The purpose of that injunction was to preserve the then existing status and to prevent any creditor from acquiring a new or additional right to or greater distributive share in the property of the power company than he possessed at the time of the commencement of the creditors' suit.

These rights of creditors became fixed on that date, the only condition to their sharing in the fund pro rata being that they should thereafter file and prove their claims within the time and in the manner prescribed by the Court. There is no pretense but that those conditions have been fully met and complied with by the appellant and other general creditors. We therefore urge that these special claimants should not be permitted, under the facts in this case, to appropriate to themselves alone a fund that properly belongs to the entire body of general creditors.

The special claimants at the time of their intervention in the foreclosure suit had but a proportionate interest in the property in the hands of the receiver equitably distributable to them. The remaining and by far the larger interest belonged to appellant and the other general creditors. When and in what manner did these other creditors lose their interest in that property, and by what right did these special claimants acquire it?

We ask that the appellant here should have been granted leave to intervene and that the orders appealed from are erroneous and should be reversed.

Respectfully submitted,

WYMAN &WYMAN,

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American Water Works and Electric Company.